

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARSHALL VANDERMARK, ET AL

Plaintiffs,

-against-

CITY OF NEW YORK, DEPARTMENT OF
ENVIRONMENTAL PROTECTION, WATER
BOARD FOR NEW YORK CITY AND LOCAL
300 SEIU,

Defendants.

Case No. 08 CV 5332

NOTICE OF MOTION

PLEASE TAKE NOTICE, that Defendant, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 300 AFL-CIO (LOCAL 300), will move this Court at the United States Courthouse at 500 Pearl Street, New York, NY 10007, for an order, pursuant to Rule 12(b)(1) and (6) dismissing the Complaint in this action against this Defendant, on the grounds that Plaintiff fails to state a claim upon which relief can be granted and the Court lacks subject matter jurisdiction because the employee benefits plans which form the basis of the sole cause of action against this Defendant are exempt governmental plans under Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, et seq.

Any response papers shall be in conformity with the Federal Rules of Civil

Procedure and local court rules.

Dated: Great Neck, New York
August 27, 2008

Respectfully submitted,

MIRKIN & GORDON, P.C.
Attorneys for Defendant SEIU Local 300
98 Cutter Mill Road, Suite 310N
Great Neck, NY 11021
(516) 466-6030

/s/ Joel Spivak

By: _____
JOEL SPIVAK (JS 0960)

TO: Richard J. Merritt, Esq.
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The City of New York
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**ATTORNEY'S
AFFIRMATION**

JOEL SPIVAK, an attorney duly admitted to practice law in the State of New York and this Court affirms the following under the penalties of perjury:

1. I am of counsel to the firm of Mirkin & Gordon, P.C., attorneys for Defendant Service Employees International Union Local 300 AFL-CIO (Local 300), in the above-captioned matter. I am familiar with the facts and circumstances set forth herein, except as to those matters stated upon information and belief, and as to those, I believe them to be true. The bases of my belief are conversations with our client and information maintained within my office.

2. I submit this Affirmation in support of this Defendant's Motion to Dismiss the sole cause of action alleged against this Defendant on the grounds that Plaintiff fails to state a claim upon which relief can be granted and the Court lacks subject matter

jurisdiction because the employee benefit plans which form the basis of the sole cause of action against this Defendant are governmental exempt plans under the Employee Retirement Income Security Act (ERISA) 29 USC § 1001, et seq.

3. For purposes of this Motion, the allegations of the Complaint are deemed to be true, although at trial certain critical allegations would be refuted. The facts which form the basis of this Motion to Dismiss are set forth in the Complaint and are reviewed here and in our Memorandum of Law submitted herewith.

4. There is no dispute that Plaintiffs are Civil Service public employees of the City of New York Department of Environmental Protection Police (a public employer) (Complaint ¶¶ 8, 78-82). They were also members of Defendant Local 300, the Union which previously represented the Plaintiff's civil service job title (Complaint ¶ 14).

5. The First Six Causes of Action in the Complaint are employer and/or government agency related and asserted against the other Defendants and not Defendant Local 300.

6. The Seventh Cause of Action against Defendant Local 300 (Complaint ¶¶ 125-135) is asserted under ERISA (Complaint ¶¶ 3, 9, 135). It alleges that Defendant Local 300 received payments from the Defendant New York City for welfare benefits including (a) health insurance benefits, (b) supplemental benefits to retirees, (c) annuity fund contributions, and (d) employee welfare fund contributions (Complaint ¶ 126).

7. Plaintiffs assert that on their behalf the Law Enforcement Employees Benevolent Association (LEEBA) made a demand for an accounting of these funds. (Complaint ¶¶ 127-132), and that Defendant Local 300 maintains excess funds which

should be paid to LEEBA for the benefit of the Plaintiffs (Complaint ¶¶ 4, 129-134).

Plaintiffs assert such rights under ERISA 29 U.S.C. §§ 1132 (Complaint ¶¶ 3, 9, 135).

8. As set forth in our Memorandum of Law, as New York City public employees, Plaintiffs are governmental employees of the City of New York. Consequently, the rights they seek to enforce under ERISA are not available to them because governmental employee benefit plans are exempt from ERISA.

9. In view of the foregoing, Plaintiffs have failed to state a claim upon which relief can be granted and the Court lacks subject matter jurisdiction in the sole Cause of Action against Defendant Local 300. Accordingly, the Complaint must be dismissed against Local 300 in its entirety.

WHEREFORE, Defendant Local 300 requests that the Complaint be dismissed and for such other and further relief as this Court deems appropriate.

Dated: Great Neck, New York
August 27, 2008

/s/ Joel Spivak

JOEL SPIVAK (JS 0960)